Filed 2/27/19 In re G.V. CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re G.V., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. G.V., Defendant and Appellant.	F076920 (Super. Ct. No. 16CEJ600699-2) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Houry A. Sanderson, Judge.

Arthur L. Bowie, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and Harry Joseph Colombo, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Following a contested hearing, the juvenile court sustained an allegation that G.V., a minor, had committed an assault with an assault rifle (Pen. Code, § 245, subd. (a)(3);[1] count 2). The court, however, found not true two additional allegations: (1) that appellant had committed assault with a firearm (§ 245, subd. (a)(2);[2] count 1) and (2) that, as a minor, he had possessed a firearm capable of being concealed upon his person (§ 29610; count 3). Appellant was continued as a ward of the juvenile court and committed to the California Department of Corrections and Rehabilitation, Division of Juvenile Justice. His maximum period of confinement was set at 13 years eight months.

On appeal, appellant raises two claims, and we find merit to his first argument. We agree that the juvenile court employed the wrong standard when it improperly permitted the prosecution to amend the wardship petition under the facts of this case. The amended assault rifle charge was not proper because this allegation had not been raised previously and it was not a lesser included offense to the original allegations (§§ 245, subd. (a)(2), 29610). Because the court sustained this amended allegation, and dismissed the other two charges, we will reverse the judgment and instruct the juvenile court to dismiss the petition. In light of this remedy, we need not address appellant's remaining claim that insufficient evidence supports the court's true finding.

BACKGROUND

We provide a general summary of the facts derived from the contested hearing. On May 30, 2017, two male suspects were seen in Fresno, California, standing over a male victim. The victim had his hands up and he was shaking his head "no." A suspect was pointing a "long firearm" or "big gun" at him. The two suspects left the area in a

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[1] All future statutory references are to the Penal Code unless otherwise noted.

[2] Regarding count 1, it was further alleged that appellant had "personally used a firearm, to wit: Handgun within the meaning of Penal Code section 12022.5(a)."

vehicle. Law enforcement responded to a witness's 911 call. An officer spotted the suspects' vehicle and a pursuit occurred. After the suspects' vehicle crashed, the two suspects fled on foot.

Shortly after the suspects fled, officers were able to locate and detain them. In separate backyards near where the suspects had fled, officers recovered a loaded .22-caliber handgun and a loaded semiautomatic assault rifle.

After taking the two suspects into custody, officers conducted a field showup that same day with the witness who had called 911. The witness identified appellant as one of the two suspects she saw involved in the crime. In court, officers identified appellant as one of the two suspects law enforcement had chased and detained on the day in question.

DISCUSSION

I. The Juvenile Court Abused Its Discretion In Permitting Amendment Of The Wardship Petition.

Appellant asserts that the juvenile court abused its discretion in allowing the prosecutor to amend the petition during adjudication.

A. Background.

We provide a relevant summary of the procedural history of this matter, which is critical to the resolution of this issue.

1. The juvenile wardship petition.

In June 2017, a juvenile wardship petition was filed against appellant in Fresno County. In count 1, it was alleged that, on or about May 30, 2017, appellant "willfully and unlawfully" committed "an assault on John Doe with a firearm" in violation of section 245, subdivision (a)(2). It was further alleged in this count that appellant "personally used a firearm, to wit: Handgun within the meaning of Penal Code section 12022.5(a)." In count 2, it was alleged that, on or about that same date, appellant violated section 29610 when he, as a minor, unlawfully possessed "a concealable pistol, revolver or firearm capable of being concealed upon the person."

2. The consolidation of cases.

On November 9, 2017, the juvenile court consolidated appellant's case with the other suspect involved in this crime, K.B., who was a minor.[3] In ordering consolidation, the court noted that the two minors were alleged to have acted together in committing these crimes.

3. The adjudication commences.

On November 14, 2017, appellant's adjudication commenced. At that time, only the two original counts alleged against him in the petition were still at issue. The first witness was called to testify that afternoon. The juvenile court heard testimony on November 14, 15, 16, 17, 21, and 22, 2017.

4. The prosecutor submits an amended wardship petition.

On day five of the adjudication, November 20, 2017, the prosecutor submitted an amended wardship petition, which added another count against appellant. In addition to the prior allegations, the amended petition also alleged that, on the day in question, appellant violated section 245, subdivision (a)(3), when he willfully and unlawfully committed an assault on John Doe with an "assault rifle." In the amended petition, the charge involving the assault rifle became count 2, and the previous charge involving the concealed firearm became count 3.

At the beginning of proceedings on November 21, 2017, appellant's counsel objected to the amended petition. Appellant's counsel generally asserted that adequate notice had not been provided to bring the new charge under section 245, subdivision (a)(3). According to appellant's counsel, the amended petition was untimely and prejudicial. Counsel cited, in part, *In re Robert G.* (1982) 31 Cal.3d 437, 442 (*Robert G.*) as authority that the amendment was improper.

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[3] K.B. is not a party to this appeal.

The prosecutor countered that the People may amend petitions "to conform with proof up until the close of trial." The evidence had established that one of the minors had possessed an assault rifle and the other had possessed a gun. The two minors had acted together. According to the prosecutor, the charge under section 245, subdivision (a)(3), had been added to clarify an "aiding and abetting theory." The prosecutor asserted that the defense had been put on notice regarding an aiding and abetting theory because all information regarding this added charge had been provided in discovery. The prosecutor cited section 1009 as authority permitting an amendment in this situation.

The juvenile court stated it was familiar with section 1009. The court indicated it had reviewed *Robert G.* and it determined that opinion was not applicable because the amended petition had not been a surprise so that due process was not violated. The court ruled that notice had been given to the defense through prior discovery. According to the court, petitions and "charging documents" may be amended to conform to proof. The court allowed the filing of the amended petition.

B. Standard of review.

An abuse of discretion standard is used to review a juvenile court's order permitting amendment of a wardship petition. (*In re A.L.* (2015) 233 Cal.App.4th 496, 500 (*A.L.*).) An exercise of discretion must be guided by applicable legal principles. (*David v. Hernandez* (2014) 226 Cal.App.4th 578, 592.) An abuse of discretion is present if a court's decision rests on an error of law. (*People v. Superior Court (Humberto S.)* (2008) 43 Cal.4th 737, 755; *David v. Hernandez, supra,* at p. 592 [denial of new trial was based on an incorrect legal assumption that amounts to an abuse of discretion].)

C. Analysis.

Appellant asserts that the amended petition violated his due process rights. He claims he did not receive notice of this amended charge prior to the start of the adjudication, and the added count was not a lesser include offense.

In contrast, respondent contends that appellant had prior notice of this potential charge. Based on (1) the evidence received at the adjudication, (2) the prosecutor's motion to consolidate appellant's and K.B.'s wardship petitions, and (3) the prosecution's trial brief, respondent argues that appellant and his counsel were on notice for nearly six months that the prosecution intended to present evidence that appellant and K.B. jointly perpetrated the assault. As such, respondent argues no due process violation occurred.

We agree with appellant and reject respondent's arguments. The court employed an improper standard in permitting the amended petition and, under the correct standard, the amendment was not warranted. Thus, the trial court abused its discretion.

1. The Penal Code does not govern the amendment of wardship petitions.

In adult criminal proceedings, absent a showing of substantial prejudice to a defendant's rights, section 1009 authorizes a trial court to amend an information "for any defect or insufficiency" at "any stage" of the proceedings. (§ 1009.) A trial court has broad discretion to permit amendments of accusatory pleadings in adult criminal proceedings. (*In re Man J.* (1983) 149 Cal.App.3d 475, 481 (*Man J.*).) However, amendments of accusatory pleadings have limitations, and "[a]n indictment or accusation cannot be amended so as to change the offense charged, nor an information so as to charge an offense not shown by the evidence taken at the preliminary examination. A complaint cannot be amended to charge an offense not attempted to be charged by the original complaint, except that separate counts may be added which might properly have been joined in the original complaint." (§ 1009.) An adult defendant may not be prosecuted for an offense which lacks evidence adduced at the preliminary hearing "or arising out of the transaction upon which the commitment was based." (*People v. Burnett* (1999) 71 Cal.App.4th 151, 165–166.)

In juvenile cases the more liberal provisions of the Code of Civil Procedure, and not the Penal Code, apply to amendments of wardship petitions.[4] (Welf. & Inst. Code, § 678; *Man J., supra,* 149 Cal.App.3d at pp. 480–481; Cal. Rules of Court, rule 5.524(d).) Under the Code of Civil Procedure, a trial court has discretion, after notice to the adverse party, to allow, "upon any terms as may be just," an amendment to a pleading. (Code Civ. Proc., § 473, subd. (a)(1).) Our Supreme Court has "reconciled the liberal civil rules" in juvenile proceedings with the requirements of due process. (*Man J., supra,* 149 Cal.App.3d at p. 481, reviewing *Robert G., supra,* 31 Cal.3d at p. 442 and *In re Arthur N.* (1976) 16 Cal.3d 226, 233–234, superseded by statute on other grounds as stated in *John L. v. Superior Court* (2004) 33 Cal.4th 158, 185–186.) The goal "was to extend to juveniles the same due process rights of notice and opportunity to defend as apply in criminal proceedings. [Citations.]" (*Man J., supra,* 149 Cal.App.3d at p. 481.)

2. A minor must receive written notice of the charges prior to the contested hearing, and amendments during a hearing are permitted only under narrow circumstances.

Due process requires that juveniles, like adults, have adequate notice of the charges against them so that they may prepare an intelligent defense. (*Robert G., supra,* 31 Cal.3d at p. 442; *A.L., supra,* 233 Cal.App.4th at p. 499.) Our Supreme Court makes clear that, to satisfy due process, a minor must be notified in writing prior to the hearing, and at the earliest practicable time, of the specific charge or factual allegations to be considered at the hearing.[5] (*Robert G., supra,* 31 Cal.3d at p. 442.)

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[4] Respondent concedes in its brief that, in juvenile cases, the Penal Code does not govern amendments to wardship petitions.

[5] A juvenile does not have the right to a preliminary hearing. (*In re Jesse P.* (1992) 3 Cal.App.4th 1177, 1182.) However, a juvenile does have other means to learn more detail about an alleged charge, including the right to file a pretrial motion to seek review of the sufficiency of the petition; the right to a detention hearing; and the right to discovery. (*Id.* at pp. 1182–1183.)

Regarding juvenile adjudications, our high court has declared that proper notice and due process are assured when a juvenile petition states the facts that support a conclusion a minor falls within Welfare and Institutions Code section 602. (*Robert G., supra,* 31 Cal.3d at pp. 442–443.) The "gravamen of a wardship petition" is proving that a minor has committed a criminal offense, which is not necessarily the offense alleged in the petition. (*Id.* at p. 443.) However, in order to provide a minor with the notice required by due process, the findings adequate to sustain a petition are "limited to proof that 'the minor committed an offense *included within* that charged in the petition.' [Citation.]" (*Ibid.*)

In a delinquency proceeding, amending a petition "is strictly limited once a minor has entered a plea of not guilty." (*A.L., supra,* 233 Cal.App.4th at p. 500.) Absent a minor's consent, an amendment during a contested hearing is appropriate only when (1) a new offense is necessarily included as a previously charged offense or (2) the new offense was expressly pleaded in the charging allegations. (*Robert G., supra,* 31 Cal.3d at pp. 442–443; *A.L., supra,* at p. 500.) Analogous to the rule applicable in adult criminal proceedings, a juvenile court "has discretion to permit amendment of a juvenile court wardship petition to correct or make more specific the factual allegations supportive of the offense charged when the very nature of the charge remains unchanged." (*Man J., supra,* 149 Cal.App.3d at p. 481.)

3. Two tests are used to determine whether a lesser offense is necessarily included in a greater offense.

Two alternative tests are used to determine whether a lesser offense is necessarily included in a greater offense. "Under the elements test, we look to see if all the legal elements of the lesser crime are included in the definition of the greater crime, such that the greater cannot be committed without committing the lesser. Under the accusatory pleading test, by contrast, we look not to official definitions, but to whether the accusatory pleading describes the greater offense in language such that the offender, if

guilty, must necessarily have also committed the lesser crime. [Citation.]" (*People v. Moon* (2005) 37 Cal.4th 1, 25–26.)

4. Two opinions are instructive in this situation.

In *Robert G.*, *supra*, 31 Cal.3d 437 (the opinion which appellant's counsel cited to the juvenile court), the minor had been charged with assault with a deadly weapon. The evidence from the contested hearing established that the minor threw two rocks, one of which hit a victim. The rock in question was about one inch in diameter. (*Id.* at p. 439.) After the People completed their case, the minor moved for acquittal, claiming the rock was not a deadly weapon. The juvenile court denied the motion, although it agreed that the rock was not a deadly weapon. (*Ibid.*) After the minor rested without presenting evidence, the People argued that the petition should be sustained because the evidence established that the minor committed a battery. Over a defense objection, the juvenile court amended the petition to charge a battery and then sustained the petition pursuant to that new charge. (*Id.* at pp. 439–440.) The *Robert G.* court reversed the judgment, determining that the wardship petition could not be amended because the battery charge had not been previously alleged, and it was not a necessarily included offense. (*Id.* at p. 445.) The high court stated that "a wardship petition under section 602 may not be sustained upon findings that the minor has committed an offense or offenses other than one specifically alleged in the petition or necessarily included within an alleged offense, unless the minor consents to a finding on the substituted charge." (*Ibid.*)

In *In re Johnny R.* (1995) 33 Cal.App.4th 1579 (*Johnny R.*), a wardship petition was filed which alleged one count of assault with a deadly weapon, along with the infliction of great bodily injury upon the victim. After the prosecutor completed a direct examination of the People's main witness, the juvenile court advised the parties that an acquittal of the assault charge was likely because of the weak evidence, and it suggested a plea bargain which would result in a finding that the minor committed the offense of possession of a dirk or dagger. The parties, however, did not reach a plea agreement.

(*Id.* at p. 1582.) The prosecutor sought leave to amend the petition to add a second charge of possession of a dirk or dagger. Over a defense objection, the court permitted the amendment. (*Id.* at pp. 1582–1583.) The juvenile court sustained the petition, finding true the amended allegation regarding possession of a dirk or dagger. The court dismissed the other charge. (*Id.* at p. 1583.) On appeal, the *Johnny R.* court determined that error had occurred. (*Id.* at p. 1583.) The juvenile hearing had already commenced, and the prosecution had examined its principal witness. The fact that the amendment occurred slightly earlier in the proceeding than the *Robert G.* amendment was not a meaningful distinction, the court reasoned, because the adjudication had "commenced and the minor had never been put on notice of a need to defend against the weapons charge." (*Johnny R.*, *supra*, 33 Cal.App.4th at p. 1584.) Furthermore, the appellate court concluded that the juvenile court abused its discretion by permitting a midtrial amendment after the court itself had pointed out the weakness of the People's case and supplied the idea for an alternative charge. (*Id.* at pp. 1584–1585.) The *Johnny R.* court noted that "[p]rosecutorial inattention" was not sufficient to permit amendment of a wardship petition in the middle of a contested hearing. (*Id.* at p. 1585.) The juvenile court had failed to comply with the high court's opinion in *Robert G.* and an abuse of discretion was present. (*Ibid.*) *Johnny R.* determined that, because the minor had been acquitted of the only charge properly lodged against him, the appropriate remedy was a dismissal of the petition. The judgment was reversed, and the matter was remanded to the juvenile court with directions to dismiss the petition. (*Ibid*.)

5. The juvenile court abused its discretion in failing to apply *Robert G.*

We agree with appellant that the juvenile court abused its discretion. As an initial matter, the amended petition, filed after the adjudication began, did not notify appellant of the new charge in advance of the hearing as is required to satisfy due process. (*Robert G., supra*, 31 Cal.3d at p. 442.) The prosecutor's citation to section 1009, and the

juvenile court's apparent reliance on that statute to permit the amendment, was in error. The Penal Code does not govern amendments to wardship petitions. Instead, such amendments fall under the Code of Civil Procedure. (Welf. & Inst. Code, § 678; *In re Man J., supra,* 149 Cal.App.3d at pp. 480–481.)

The juvenile court failed to apply *Robert G.* Instead, the court erroneously focused on the possible prejudice or unfair surprise that appellant might suffer. However, this is not the correct standard. (*A.L., supra,* 233 Cal.App.4th at p. 504, fn. 6.) Amending a wardship petition "is strictly limited once a minor has entered a plea of not guilty." (*Id.* at p. 500.) Amendments to conform to proof are permissible in juvenile matters " 'if the evidence, while insufficient to establish that the minor committed the charged offense, is nonetheless adequate to prove *a lesser, included offense*.' [Citation.]" (*Robert G., supra,* 31 Cal.3d at p. 443.) "In particular, absent the minor's consent, amendment *during a contested hearing* is only appropriate if an offense is ' "necessarily included" ' in the offense actually charged or is ' "a lesser offense which, although not necessarily included in the statutory definition of the offense, is expressly pleaded in the charging allegations." ' [Citations.]" (*A.L., supra,* 233 Cal.App.4th at pp. 499–500, italics added & omitted.) These requirements were not met.

The amended charge did not satisfy the elements test. The legal elements of assault with a firearm (§ 245, subd. (a)(2)) do not include all elements for conviction of assault with a machinegun or assault weapon (*id.* at subd. (a)(3)). Indeed, any "firearm" is sufficient under subdivision (a)(2) for a conviction while a conviction under subdivision (a)(3) requires specific assault weapons. (§ 245, subds. (a)(2) & (3).)

Likewise, the amended charge did not satisfy the accusatory pleadings test. Count 1 of the original petition alleged that, on or about May 30, 2017, appellant "willfully and unlawfully" committed "an assault on John Doe with a firearm" in violation of section 245, subdivision (a)(2). It was further alleged in this count that appellant "personally used a firearm, to wit: *Handgun* within the meaning of Penal Code

section 12022.5(a)." (Italics added.) In count 2, it was alleged that, on or about that same date, appellant violated section 29610 when he unlawfully possessed "a concealable *pistol, revolver* or *firearm* capable of being concealed upon the person." (Italics added.)

We disagree with respondent's claim that the "amended wardship petition did not change either the prosecutor's theory of the case or the evidence she intended to adduce to support the charged offenses." Nowhere in the original petition did the prosecution allege facts that suggested appellant had aided and abetted K.B. in the assault, or that appellant used a firearm that might qualify as a machinegun or assault rifle under section 245, subdivision (a)(3). The added assault charge (§ 245, subd. (a)(3)) was not a necessarily included offense to the prior allegation of assault with a firearm under section 245, subdivision (a)(2), or section 29610. As such, this amendment did more than merely "correct" the wardship petition or "make more specific the factual allegations supportive of the offense charged when the very nature of the charge remains unchanged." (*Man J., supra,* 149 Cal.App.3d at p. 481.)

Respondent asserts that, based on a motion and a brief, appellant received adequate notice of the amended charge. First, in a motion to consolidate filed in June 2017, the prosecutor had asserted that appellant and K.B. (the other minor in this matter) had been "jointly charged" with violating section 245, subdivision (a)(2), along with a firearm enhancement pursuant to section 12022.5, subdivision (a). The prosecutor had stated: "The pleadings are identical as well as the witnesses the People intend to produce at the adjudication hearing." Second, in the prosecution's adjudication brief, the prosecutor had asserted that she expected the evidence to show that appellant and K.B. confronted the victim and held him at gunpoint. They forced the victim to the ground before walking away.

Based on the comments appearing in both this motion and brief, respondent contends that, although not pled in the original petition, appellant was on notice prior to the adjudication that the People intended to prove that the minors aided and abetted each

other in committing the assault. According to respondent, both minors were principals in the charged crime, and one minor used an assault rifle. Respondent, however, cites no law supporting its argument and we reject this assertion based on *Robert G.*

Charges against a minor under the age of 18 years must be filed in a petition under the Welfare and Institutions Code. (Welf. & Inst. Code, § 603, subd. (a).) As made clear in *Robert G.*, "a wardship petition under section 602 may not be sustained upon findings that the minor has committed an offense or offenses other than one specifically alleged in the petition or necessarily included within an alleged offense, unless the minor consents to a finding on the substituted charge." (*Robert G., supra*, 31 Cal.3d at p. 445.) Due process and adequate notice are assured when a juvenile petition states the facts which support a conclusion that a minor falls under Welfare and Institutions Code section 602. (*Robert G., supra,* at p. 443.) *Robert G.* refutes respondent's position.

Based on this record, the juvenile's court's order permitting amendment of the wardship petition was not guided by applicable legal principles. (See *David v. Hernandez, supra,* 226 Cal.App.4th at p. 592.) The court's decision rested on an error of law. (See *People v. Superior Court (Humberto S.), supra*, 43 Cal.4th at p. 755.) Accordingly, the trial court abused its discretion, and reversal is required. (*Johnny R., supra,* 33 Cal.App.4th at p. 1585.)

6. We apply the remedy from *Johnny R.*

Having determined the court should not have allowed the amendment, we must turn to the remedy. The facts of this case are very similar to the situation in *Johnny R., supra,* 33 Cal.App.4th 1579. The amended petition in this matter was permitted very late in the proceedings, after most of the prosecution's witnesses had testified. The prosecutor submitted the amended petition prior to the People resting its case, but after having called approximately eight of its 10 witnesses.

As in *Johnny R.*, appellant was acquitted of the charges properly lodged against him. As noted in *Johnny R.*, had the juvenile court correctly exercised its discretion,

appellant would have been cleared of all charges. "Principles of double jeopardy and section 654 would serve as a bar to reprosecution for other related offenses arising from the same transaction. [Citation.]" (*Johnny R., supra,* 33 Cal.App.4th at p. 1585.) In *Johnny R.*, the appellate court reversed the juvenile court's true finding and remanded the case to the juvenile court with directions to dismiss the petition. (*Ibid.*)

The remedy in *Johnny R.*, is appropriate in this situation. Because appellant had been acquitted of the allegations properly lodged against him in counts 1 and 3, we will reverse the judgment and remand the matter to the juvenile court with directions to dismiss the underlying petition. (*Johnny R., supra,* 33 Cal.App.4th at p. 1585.)

We do not impose this remedy lightly. Appellant's actions in this matter were deplorable and we do not condone them. However, our high court has made clear that fundamental due process is satisfied when a juvenile is informed in the accusatory pleadings of the charges against him or her. (*Robert G., supra,* 31 Cal.3d at p. 442.) As our Supreme Court has further noted, it may be very difficult to determine whether a juvenile was misled to his prejudice and prevented from preparing an effective defense based on developments which occur during an adjudication. It may never be known with any confidence after an adjudication what defenses might have been asserted had adequate notice of the possible offenses been provided.[6] (*Ibid.*) Accordingly, we reverse the judgment.

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[6] Although *Robert G.* was discussing an adult defendant, the high court made clear that these concerns apply to juvenile court proceedings. (*Robert G., supra,* 31 Cal.3d at p. 442.)

DISPOSITION

The judgment is reversed. The matter is remanded to the juvenile court with directions to dismiss the underlying petition.

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LEVY, Acting P.J.

WE CONCUR:

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POOCHIGIAN, J.

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PEÑA, J.